Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ALEXANDER J. LABORA,
putative class member on behalf of himself
and all others similarly situated,

Petitioner,

vs.

MCI TELECOMMUNICATIONS CORPORATION,

Respondent.

**On Petition For Writ Of Certiorari To
The Circuit Court Of Appeals, Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are class-action lawsuits for improper billing practices that are "picked off" by a defendant's partial, unilateral refunds on one putative class representative's telephone bill still controversies capable of repetition, yet evading review?

2. Can a putative class-action lawsuit be dismissed for mootness before the non-movant has had an opportunity to discover, present and incorporate opposing material made pertinent by the dismissal motion?

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OPINIONS BELOW

The unpublished opinion and judgment of the court of appeals appear at Appendix ("App.") A. The order of the district court granting plaintiff's motion for extension of time appears at App. B. The order of the district court granting the defendant's motion to dismiss appears at App. C. The order of the district court denying plaintiff's motion for rehearing, denying plaintiff's Rule 60(b)(2) motion for relief from order of dismissal and denying plaintiff's motion for leave to file amended complaint appears at App. D. Plaintiff's response to defendant's motion for stay and memorandum in support thereof appears at App. E as other material useful to the court.

STATEMENT OF JURISDICTION

The court of appeals decided Petitioner's case on December 7, 1999, App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

Article III, section 2 of the Constitution provides that the "Judicial Power shall extend" to enumerated "cases" and "controversies."

STATEMENT OF THE CASE

A. Proceedings Below

On May 13, 1998, Alexander Labora filed his class-action complaint on behalf of himself and others similarly situated. Pertinent here, Count I alleged a violation of 47 U.S.C. § 203 and § 364.08(1), Fla. Stat. (1998), for improper billing practices, and sought damages, costs, interest and attorneys' fees under 47 U.S.C. § 206. R1-1-7. Petitioner attached his April MCI telephone 1998 bill to his complaint as evidence of MCI's improper practices. R1-8-2, 16-17.

MCI's Tallahassee and Maryland counsel asked for more time to respond to the complaint. R1-4-1; R1-11-3. Petitioner agreed to MCI's request. R1-5-1; R1-6-1; R1-11-3. The next day, on June 9, 1998, MCI issued to Petitioner's MCI account a unilateral credit for some, but not all, of the charges on Petitioner's April bill. Then, MCI moved to dismiss Petitioner's complaint for mootness, arguing that MCI had refunded Petitioner in full for his contested charges in his April bill. R1-8-1-8. MCI also argued that its billing practices and unilateral refund were proper, R1-8-1-8 & Attachments, and attached tariffs and the affidavits of two MCI employees to show it. R1-8-1-8 & Attachments.

MCI mailed its motion to dismiss on June 18, 1998. R1-8-1-8. On June 19, 1998, Petitioner filed his motion for class certification and propounded his class discovery as soon as MCI's South Florida counsel had been identified. R1-11-3; R1-10-1-11. On July 2, 1998, MCI moved to stay Petitioner's class certification and motion to dismiss discovery. R1-12-1; R1-13-1-7. Petitioner had propounded

discovery directed toward MCI tariffs at issue in this case. R1-13-2-3. MCI opposed this discovery on the basis that it was overly burdensome.[1]

Petitioner opposed dismissal because he had a continuing claim. R1-11-7. MCI had refunded two of the three calls purportedly commencing at 9:32 a.m. on March 31, 1998, leaving the cost of one of the remaining calls on his April bill, un-refunded, plus interest on those charges and attorneys' fees. R1-11-6-7. Petitioner also argued MCI had purposefully acted to extinguish this class action controversy, and the issues were demonstrably capable of repetition, yet evading review. R1-11-7-9. MCI replied with yet more MCI tariffs, an MCI affidavit from Kenneth Lange, a Bellcore LSSGR Manual, and Local Exchange Carrier ("LEC") computerized switch records of Petitioner's calls. R1-15-10 & Attachments.

On July 20, 1998, the district court granted MCI's motion to dismiss, three days after granting Petitioner's extension of time to respond by July 27, 1998 to MCI's motion for discovery stay. App. B, App. E. The district court concluded that MCI had fully refunded Petitioner's alleged duplicate charges representing Petitioner's total potential damages. App. C at 7a, R1-19-1, 5. And it denied all pending motions as moot, closing Petitioner's case. App. C at 10a, R1-19-5. On July 22, 1998, Petitioner timely moved for rehearing and Rule 60(b)(2) relief from the order of dismissal. App. D at 12a, R1-21-1. Petitioner presented his June 22, 1998 bill as new evidence that,

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[1] The FCC and the Florida Public Service Commission eagerly provided to Petitioner the two controlling MCI tariffs.

even during the pending motion to dismiss, MCI continued, in violation of its tariffs, unauthorized billing practices. App. D at 14a, R1-21-2; R1-25-1; R1-27-1-3. Petitioner requested that the Court vacate its order of dismissal to allow him to go forward with his propounded discovery. R1-21-3. On August 7, 1998, Petitioner also filed a motion for leave to amend his complaint to incorporate this new evidence in his June, 1998 telephone bill. MCI opposed Petitioner's motion for rehearing and Rule 60 motion and leave to amend, attaching more affidavits and records – a second affidavit of Kenneth Lange, additional copies of Petitioner's LEC switch records, and an affidavit of Theresa Lyles. R1-23-1-5; R1-26-1.

From the district court's order denying Petitioner's motion for rehearing, Rule 60(b)(2) motion, and motion for leave to file amended class action complaint, and denying all other motions, including class certification, as moot, App. D at 15a, Petitioner timely appealed. R1-28-1-4. The court of appeals affirmed per curiam after oral argument the district court's reasoning and factual findings. App. A at 1a.

B. Facts

In suing MCI for a practice of improper billing under MCI federal and Florida tariffs and for unjust enrichment, Petitioner attached two pages of his April 22, 1998 MCI bill reflecting double- and triple-billing for non-talk, call-attempts to his complaint:

Date	Time	Place	Number	Rate	Min	Amount
		*	* *			
Mar 31	9:32 a	Hollywood, FL	954 457-8695	24 Hr	1.0	.05
Mar 31	9:32 a	Hollywood, FL	954 457-1912	24 Hr	18.6	.93
Mar 31	9:32 a	Hollywood, FL	954 457-1912	24 Hr	18.3	.91
		*	* *			
Apr 3	4:07 p	Mexiccy, MX	5255954880	24 Hr	1.0	.49
Apr 3	4:07 p	Mexiccy, MX	5255954880	24 Hr	1.0	.49

R1-1-Exhibit "A".

MCI attached to its dismissal moving papers various exhibits and affidavits to argue that Petitioner's April account had been refunded in full, that MCI's unilateral refund of Petitioner's account was authorized under its tariffs and that MCI's billing practices were entirely proper. R1-8-1-8 & Exhibits; R1-15-1-10 & Exhibits. To the motion to dismiss, MCI also attached an affidavit from Marjorie Daniels to show that Petitioner disputed (1) one alleged duplicate call on 3/31/98 for $ 0.93, (2) an alleged duplicate call on 4/3/98 for $ 0.49 and (3) tax of $ 0.10, totaling $1.52, which Petitioner was credited on June 9, 1998. R1-8-16-17. To rebut the mootness argument, Petitioner continued to dispute three duplicate calls on March 31, 1998 and MCI's credit, against his consent, as well as a credit for only one of those three disputed calls, without interest for the time that MCI had retained Petitioner's payment. R1-11-1, 2, 6. He further disputed that MCI still retained and Petitioner was stilled owed money for one of the three "triplicate" calls on March 31, 1998, plus interest on that delayed refund. R1-11-6. And he argued that his costs and attorneys' fees remained outstanding. R1-11-7.

MCI attached to its 12(b)(1) moving papers an FCC tariff No. 1, 14th Revised Page Number 18.2.1, at 2, to show that MCI could "round up" a customer's charge to the full charge of one full minute. R1-8-12. MCI also attached a Florida Public Service Commission tariff, ("F.P.S.C.") Tariff Number 2, 14th Revised Sheet 23, to show that Petitioner had "one-way" Execunet service. R1-8-14. It attached FCC Tariff Number 1, 36th Revised Page Number 13.1, R1-15-11, to show that MCI could credit its customer's accounts, in its discretion and

against the customer's wishes. MCI attached the affidavit of Kenneth Lange, who provided his interpretation of the LATA System Switching Generic Requirements ("LSSGR") to show that Petitioner, not MCI, was at fault, for not holding his telephone receiver down long enough and, thereby, triggering a call-waiting or three-way calling service that a computer was programmed to, therefore, bill. R1-15-16-51.[2]

MCI presented no document showing that Petitioner had call-waiting or three-way calling service. Mr. Lange did not explain how Petitioner could call the same person, at the same number and speak with that same person simultaneously on three lines at the same time, or under which tariff MCI could bill its customers, irrespective of the Local Exchange Carrier's ("LEC's") computer logs, for mere network usage time or non-talk call attempts.

The district court granted MCI's motion to dismiss, and Petitioner presented, two days after his counsel returned from a long-scheduled vacation, evidence of a continuing MCI practice of billing for non-talk call-attempts, and timely moved for relief from judgment and leave to amend, which the district court denied:

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[2] MCI did not provide a manual explaining the switch record codes.

Date	Time	Place	Number	Rate	Min	Amount
Jun 1	10:47 a	Mexiccy, MX	5252085609	24 Hr	1.0	.49
Jun 1	10:51 a	Mexiccy, MX	5252085609	24 Hr	1.0	.49
Jun 1	11:00 a	Mexiccy, MX	5252085609	24 Hr	1.0	.49
Jun 1	11:01 a	Mexiccy, MX	5252085609	24 Hr	1.6	.78
Jun 1	11:13 a	Mexiccy, MX	5255685644	24 Hr	1.0	.49
Jun 1	11:15 a	Mexiccy, MX	5255203299	24 Hr	1.0	.49
Jun 1	11:13 a	Mexiccy, MX	5255685609	24 Hr	1.0	.49
Jun 1	11:17 a	Mexiccy, MX	5252085609	24 Hr	1.3	.63

R1-21-1-3 & Exhibit "A". The court of appeals affirmed the district court. App. A.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS IMPLICITLY DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

In a long line of cases, of which *Friends of the Earth v. Laidlaw* is the most recent, this Court has recognized that the party asserting mootness carries the burden of establishing it. The controversy over MCI's billing *practices* did not die with partial refund of some disputed telephone calls on one putative class representative's telephone bill for one month. And the Eleventh Circuit's precedent affirming otherwise conflicts with the Court's long-standing precedent on continuing "case or controversy."

The decision below is also a timely opportunity for this Court to make clear that orchestrated, technical mootness in the form of forced tender is not enough under *Roper* to moot a class-action complaint. Without this Court's guidance, putative class representatives like Mr. Labora can be "picked off" before ever getting to a pending class certification motion. It is not a question of which motions will be decided on the merits in the area of consumer protection, but whether they will ever be decided on the merits. Where the practice of improper billing is not just possibly capable of repetition, yet evading review but *does* recur – in the putative class representative's June, 1998 telephone bill – lower courts should review the merits of the motion for class certification before dismissing, to determine: (1) whether there

remains a live "case or controversy" between the defendant and at least some members of the class the representative seeks to represent, and (2) whether the representative would be a proper class representative. Petitioner should have been granted leave to amend to cure any mootness defects in his complaint, and the stay on discovery made pertinent by MCI's motion to dismiss should have been lifted to allow discovery of opposing material.

A. Eleventh Circuit Precedent Which Approves Dismissal of Potential Class-Action Lawsuits by Burdening Plaintiffs with Establishing a Case Is Not Moot, Without Reaching the Issue of Standing, Conflicts with *Friends of the Earth v. Laidlaw.*

The district court rulings and the court of appeals affirmance of them here conflict with the decisions of this Court, most recently the *Friends of the Earth v. Laidlaw Environmental Services, Inc.*,[3] reversing a summary judgment dismissal for mootness, and reaffirming the strict standard that a party moving to dismiss for mootness bears.

Here, MCI moved to dismiss for mootness, R1-8-1-8, after unilaterally crediting some, but not all, of Petitioner's disputed charges. At the same time, the district court, on MCI's motion for stay of Petitioner's motion for class-action certification and motion-to-dismiss discovery,

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[3] *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 2000 U.S. LEXIS 501 at *8 (Jan. 12, 2000) (citing *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

dismissed Petitioner's class action case as moot. The district court would not consider Petitioner's pending class-action certification. R1-19-5. It did not afford Petitioner an opportunity to amend any possible deficiencies in the allegations of his class-action complaint to cure mootness. It would not allow Petitioner discovery into the issues raised in MCI's motion to dismiss. And it would not allow Petitioner to amend his complaint to incorporate new evidence now made pertinent by MCI's motion to dismiss.

Friends of the Earth,[4] explained that:

> the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

This Court has made clear that, while mootness, like the related doctrine of standing, restricts the judicial power of Article III courts to decide only actual cases and controversies that can be redressed by a lawsuit,[5] cases or controversies are considered "actual" when they are "definite and concrete, touching the legal relations of parties having adverse legal interests."[6]

Accordingly, under *Friends of the Earth*,[7] it was error to affirm dismissal below on MCI's reasoning that

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[4] *Friends of the Earth*, 2000 U.S. LEXIS 501 at *8.

[5] *Friends of the Earth*, 2000 U.S. LEXIS 501 at *10; *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

[6] *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

[7] *Friends of the Earth*, 2000 U.S. LEXIS 501 at *11.

"*Plaintiff* . . . failed to establish" his claims were not moot. R1-15-4 (emphasis added), App. C at 8a. The decisions below conflict with this Court's decisions holding that it is the party arguing mootness that carries the "heavy" burden of proving "it absolutely clear that the allgedly wrongful behavior could not reasonably be expected to recur."[8] MCI never did that.

The decisions below never applied that analysis. Properly applied under this Court's decisions, the partial refund here on one telephone bill could not moot a controversy over an allegedly improper billing dispute where the precise wrong at issue was not one charge on one incorrect telephone bill, but *a practice* of billing customers for non-talk, call-attempts in violation of controlling tariffs.

SECTION 3 – DESCRIPTION OF SERVICE

3.1 TIMING OF CALLS

> *Billing for calls begins at the time* MCI's frequency monitoring device detects that *the called party has answered,* and ends when the frequency monitoring detects that either the called party or calling party hangs up.

F.P.S.C. Tariff No. 2, 8th Revised Sheet 20 (emphasis added). Likewise, the FCC Tariff nowhere authorized MCI to bill its customers, irrespective of what its LEC

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[8] *Friends of the Earth,* 2000 U.S. LEXIS 501 at *11; *United States v. W. T. Grant Co.,* 345 U.S. 629, 633-636 (1953).

computers were programmed to log, for mere network usage. "[T]he rate period *at the time the connection is established* applies to the entire call." Tariff F.C.C. No. 1, 102nd Revised Page No. 18.2 (emphasis added).

Additionally, the decisions below conflict with the voluntary cessation theory this Court reaffirmed in *Friends of the Earth*.[9] The moving party's mere voluntary cessation of an allegedly illegal or improper *practice* does not moot a case. "[I]f it did, the courts would be compelled to leave '[the] defendant . . . free to return to his old ways.' "[10]

The allegation of a practice of improper billing of call attempts that MCI continually asserted it was entitled to bill stated a live controversy.[11] MCI never presented a tariff authorizing it to engage *in this specific billing practice* – to bill for two calls to the same number, at the same time. And an MCI refund on one telephone bill could not moot an MCI practice applied to all potential MCI class members. Beyond the allegations of an improper billing practice, Petitioner's case stated a live controversy by virtue of his only-partial refund (and, therefore, only-partial extinction of this controversy) on one of Petitioner's telephone bills.[12]

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[9] *Friends of the Earth*, 2000 U.S. LEXIS 501 at *41.

[10] *W. T. Grant Co.*, 345 U.S. at 632; *see, e.g., United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897).

[11] *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

[12] *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990).

B. Eleventh Circuit Precedent Which Approves Dismissal of Potential Class-Action Lawsuits Based on Orchestrated Mootness Before the Non-Movant Has Had an Opportunity to Discover, Present and Incorporate Opposing Material Pertinent to the Motion to Dismiss Conflicts with *Guaranty National Bank v. Roper* and *United States Parole Comm'n v. Geraghty.*

The court of appeal's affirmance of the district court implicitly accepted MCI's position below that parties with adverse legal interests that orchestrate technical mootness properly strip a federal court of jurisdiction to decide important issues, because those issues are not still "capable of repetition, yet evading review". This conflicts with this Court's precedent to the contrary.[13]

In *Guaranty National Bank v. Roper*,[14] credit card holders brought a class action challenging, not even a practice, but specific finance charges levied on their cards and those of similarly situated card holders. After the district court denied their motion for class certification on its merits, the bank tendered to each named plaintiff the maximum amount he would have recovered had he succeeded on the merits. The amounts tendered also *included legal interest and court costs.* The named plaintiffs refused the tender, but made a counteroffer of judgment in which they attempted to reserve the right to appeal the adverse

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[13] *Compare Evitts v. Lucey*, 469 U.S. 387, 391 (1985); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *W.T. Grant Co.*, 345 U.S. at 633.

[14] *Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1979).

class certification ruling. The bank rejected their counter-offer.[15]

Based on the bank's offer, the district court entered judgment in their favor, over their objection, and dismissed the action as moot. Following dismissal, the plaintiffs appealed the trial court's previous order denying their motion to certify the class. The bank argued that the entire case had been mooted by their offer, but the court of appeals held that the case was not mooted by the forced tender. *Id.*

This Court agreed, and stated that an "appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Article III."[16] In this Court's view, the plaintiffs retained such a stake in the appeal because, even after full tender of their individual damages, plaintiffs "had *a desire to shift part of the costs of litigation to ihose who will share in its benefits* if the class is certified and ultimately prevails."[17] The Court stressed that "at no time did the named plaintiffs accept the tender in settlement of the case; instead, judgment was entered in their favor by the court without their consent and the case was dismissed over their continued objections."[18]

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[15] *Id.*

[16] *Roper*, 445 U.S. at 334.

[17] *Id.* (emphasis added).

[18] *Id.* at 332 (footnote omitted).

Roper is important here because, first, it is clear from its language that it never intended to suggest that corporations can "pick off" class-action plaintiffs by involuntarily crediting their accounts, as each one comes forward with their consumer protection claim, under the guise of forced "customer credits". MCI never disputed that Petitioner's refund was involuntary; MCI unabashedly cited one of its authorizing tariffs to force this unilateral refund upon Petitioner, with the clear purpose of mooting his claim and snuffing out a class-action lawsuit.

Moreover, of the three duplicate charges on March 31, 1998, where MCI, against Petitioner's consent, issued a credit for only one of those charges, two remained unpaid, none with interest for the time MCI had retained Petitioner's payment for those calls. R1-11-1, 2, 6. MCI still retained and Petitioner was still owed money for at least one, if not two, of the contested "triplicate" calls, plus interest on those delayed refunds, irrespective of how large or how small that amount was.

Third, *Roper* recognized, and the lower courts here should have followed, that putative class-action plaintiffs – even after full tender of their individual damages – retain a stake in a case if their *"costs of litigation to those who will share in its benefits* if the class is certified and ultimately prevails" remain outstanding.[19] This Court affirmed the Fifth Circuit's decision, *Roper v. Consurve,*

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[19] *Roper*, 445 U.S. at 334 (emphasis added); *see St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-90 (1938) ("events occurring subsequent to the institution of the suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction").

Inc.,[20] on the named plaintiffs' assertion of a cognizable economic interest in the certification question rooted in their "desire to shift to successful class litigants a portion of those fees and expenses incurred in [the] litigation," and this concern "supplied the personal stake in the appeal required by Article III."[21] This was so even though the majority of this Court conceded and the dissent explicitly underscored that the named plaintiffs' allegations of an interest in shifting to successful class litigants a portion of their attorneys' fees and expenses turned on a contingent attorneys' fee; the fee was to be paid from the named plaintiffs' recovery, and no suggestion was made that the plaintiffs could recover this amount from successful class litigants.[22]

Finally, under the Court's *Roper* decision, Petitioner's attorneys' fees, while not solely resuscitating an otherwise moot claim, indeed kept a raging controversy over the billing practice itself, in combination with the remaining amounts to be adjudicated and the un-refunded charge, outstanding interest and costs. R1-11-7. *Roper*'s holding is consistent with § 206's fee provision as well as other fee statutes. Section 206 says that a common carrier "shall be liable . . . for the full amount of damages sustained . . . together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs of the case.". It nowhere mentions "prevailing party" status, otherwise requiring a

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[20] *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978).

[21] *Roper*, 445 U.S. at 334 n.6 and 337 n.9.

[22] *Id.* at 338 n.9, 350-51.

judgment on the merits, as a condition precedent to an award of fees.[23]

There is no reason under *Roper* and the language of § 203 that these fees should not, in addition to the outstanding controversy over the disputed improper billing practice, survive mootness.[24] As long as one damage claim of an individual named plaintiff suing on a federal question remained unresolved and MCI continued to

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[23] In contrast, 42 U.S.C. § 1988 (1988), a provision concerning the award of attorney's fees in civil rights cases, references fee awards to a "prevailing party." Among the circuits, claims for fees still survived mootness. *See Williams v. Alioto*, 625 F.2d 845, 848 (9th Cir. 1980) ("Claims for attorneys' fees ancillary to the case survive independently . . . and may be heard even though the underlying case has become moot."), *cert. den'd*, 450 U.S. 1012 (1981); *Robinson v. Kimbrough*, 652 F.2d 458 (5th Cir. 1981) (fees should be awarded on remand if compliance resulted from the lawsuit); *Doe v. Marshall*, 622 F.2d 118 (5th Cir. 1980) (preliminary injunction allowing plaintiff to play high school sports became moot before appeal decided; fees awarded), *cert. den'd*, 451 U.S. 993 (1981); *Kimbrough v. Arkansas Activities Assoc.*, 574 F.2d 423 (8th Cir. 1978) (same); *Morrison v. Ayoob*, 627 F.2d 669, 671 (3d Cir. 1980) (fees awarded where challenged practice abandoned after suit filed but before trial, mooting case), *cert. den'd*, 449 U.S. 1102 (1981); *Oldham v. Ehrlich*, 617 F.2d 163, 168 (8th Cir. 1980) (challenged regulation was amended before trial; fees awarded because it was "virtually certain [the old regulation] would have been held invalid"); *Barbara Z. v. Obrasdovich*, 937 F. Supp. 710, 718 (N.D. Ill. 1996).

[24] *See also Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874 (11th Cir. 1990) (award of interest on delayed refund is proper); *Mandalay Shores Cooperative Housing Ass'n, Inc.*, 87 B.R. 184 (M.D. Fla. 1988) (plaintiff entitled to recovery of interest on delayed refund under principles of equity).

maintain its practices were proper, the "controversy" continued and Petitioner retained a sufficient interest in the action to be a class representative in a federal court.[25] At best, therefore, MCI's partial refund created a sham or technical mootness that did not moot this class-action lawsuit.[26]

Courts, under circumstances like these, allow the suit under these circumstances to go forward as a class action, and certification "relates back" to the filing of the complaint or the class certification "relates back" to the request for certification.[27]

The issues raised in the allegations of improper billing practices were also not moot because they were demonstrably "capable of repetition, yet evading review."[28] The decisions below conflict with the overwhelming precedent that an issue giving rise to an injury is "capable of repetition, yet evading review" when (1) there is a "reasonable expectation or a demonstrated probability that the same controversy will recur involving

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[25] *Ellis v. Blum*, 643 F.2d 68, 85 (2d Cir. 1981) ("The Supreme Court, noting the 'flexible character' of the mootness doctrine, has recognized that vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome.' " (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980)).

[26] *See Roper*, 445 U.S. at 339.

[27] *See, e.g., Geraghty*, 445 U.S. at 404-05; *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Swisher v. Brady*, 438 U.S. 204 (1977); *Sosna v. Iowa*, 419 U.S. 393, 403 n.11 (1975); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1048 (5th Cir. 1981).

[28] *See Roe v. Wade*, 410 U.S. at 125; *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911).

the same complaining party," and (2) the "challenged action was in its duration too short to be fully litigated prior to its cessation or expiration."[29] Only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" could the case be moot.[30] Here, MCI argued precisely the opposite – its billing practices were just fine. Petitioner's second, June bill showed, however, that the alleged improper MCI double- and triple-billing for call attempts was demonstrably recurring.[31] At a minimum, therefore, Petitioner and all other MCI customers similarly situated were entitled to discovery into the class and into these issues – not a dismissal of Petitioner's entire class-action lawsuit.[32]

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[29] *The News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1507 (11th Cir. 1991) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482-83 (1982) (per curiam)); *see County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *see City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam); *see also Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992) (superseding statute or regulation moots case only to extent it removes challenged features of prior law); *Port v. Heard*, 764 F.2d 423, 427 (5th Cir. 1985) ("the fine, as a direct consequence of the contempt convictions, preserves the Ports' stake in the merits of the appeal they bring before us, despite their release from custody."); *see also James Emory, Inc. v. Twiggs County*, 883 F. Supp. 1546 (M.D. Ga. 1995) (cessation of wrongful conduct not create mootness). *Johnson v. State*, 586 F.2d 387 (5th Cir. 1978) (changed policy or voluntary cessation must satisfy all deficiencies of prior wrong).

[30] *W. T. Grant Co.*, 345 U.S. at 633-636.

[31] *Schoolcraft v. Sullivan*, 971 F.2d 81 (8th Cir. 1992), *cert. den'd sub. nom, Shalala v. Schoolcraft*, 510 U.S. 1081 (1994).

[32] *United States v. Western Pacific R.R.*, 352 U.S. 59, 63-65 (1956); *City of Peoria v. General Electric Cablevision Corp.*, 690 F.2d 116, 120-21 (7th Cir. 1982); *National Communications Ass'n, Inc. v.*

The lower court decisions also conflict with the precedent finding these issues evade review. On May 13, 1998, Petitioner filed his class action lawsuit. On June 8, 1998, MCI requested and Petitioner agreed to an enlargement of time to respond to the complaint, so that MCI could find local counsel in Miami. R1-5-1-2, R1-6-1. On June 9, 1998, MCI issued a unilateral credit for some, but not all, of the disputed charges on Petitioner's April bill – just nine days before filing its June 18th motion to dismiss on the basis of mootness. R1-8-16-17. By virtue of these credits, the "challenged action was . . . too short to be fully litigated prior to its cessation or expiration."[33] MCI's monthly billing continued to subject Petitioner – each month – to a controversy over MCI's alleged improper billing practice. MCI admitted Petitioner had a history of disputing his MCI charges. R1-8-9. On June 19, 1998, Alexander Labor moved to be certified to proceed as a class action. R1-10-1. The district court granted MCI's motion to stay class certification and discovery, never deciding the merits of the motion.

Class actions offer an added exception to the usual mootness doctrines.[34] Where a live dispute remains as to at least certain class members, even though the named

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American Tel. & Tel. Co., 46 F.3d 220, 222-23 (2d Cir. 1995); *Allnet Communication Service, Inc. v. National Exchange Carrier Ass'n, Inc.*, 965 F.2d 1118 (D.C. Cir. 1992); *see, e.g., In the Matter of Theodore Allen Communications, Inc.*, 12 FCC 6623, 1997 FCC LEXIS 2773 (May 22, 1997) (any ambiguity in tariffs should be construed against framer and favorably for users).

[33] *Murphy*, 455 U.S. at 482.

[34] *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 753-755 (1976).

plaintiff's individual claim has become moot, the class action is not moot.[35] As for class actions in which the named plaintiff's claim becomes moot before full adjudication of the substantive issues, courts allow the suit to go forward as a class action when (1) the class has been certified prior to the mooting of the plaintiff's claims, *or* (2) the class certification "relates back" to the filing of the complaint *or* (3) the class certification "relates back" to the request for certification.[36] Adhering to this "relation back" doctrine, courts allow a named plaintiff whose individual claims have expired to continue to represent the class in the situation in which his claims are transitory and capable of recurring with respect to him.[37] Class certification should relate back if (1) the named plaintiff's claim has expired as a result of the transitory nature of the claim; (2) *the defendant has purposefully mooted the claim*; or (3) some other action has occurred between the filing of the suit and certification which unreasonably impairs the plaintiff's right to seek judicial review. The decisions below should have recognized that here.[38]

First, there is no question that MCI purposefully mooted some, or all, of the claims, as MCI boldly asserted

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[35] *See, e.g., Sosna v. Iowa*, 419 U.S. 393 (1975).

[36] *See, e.g., Geraghty*, 445 U.S. at 404-05; *Gerstein v. Pugh*, 420 U.S. at 103; *Brady*, 438 U.S. at 204; *Sosna*, 419 U.S. at 403 n.11.

[37] *See, e.g., Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir. 1991); *Rocky v. King*, 900 F.2d 864, 869-71 (5th Cir. 1990); *Ahmed v. University of Toledo*, 822 F.2d 26 (6th Cir. 1987).

[38] *See, e.g., Zeidman v. J. Ray McDermott & Co.*, 651 F.2d at 1045-51.

its right to do so under its tariffs.[39] MCI's distinction below that these other plaintiffs' claims were not moot because these other plaintiffs rejected the offers tendered to them, while Petitioner accepted MCI's tenders, was disingenuous and has been specifically rejected by the courts.[40] A settlement or acceptance of a tendered settlement is like "[a] consent decree which, although in effect a final judgment, is a contract founded on the agreement of the parties. . . . It should be construed to preserve the position for which the parties bargained. . . . "[41] A putative class defendant cannot snatch away jurisdiction and extinguish a motion for class certification through non-consensual refunds any more than the U.S. district court in *Roper* could dismiss for mootness a case forced to settle through judicial fiat.[42]

As the Seventh Circuit explained, "[j]ust as necessity required the development of the relation back doctrine in cases where the underlying factual situation naturally

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[39] As will be set forth below, MCI may have had the right to issue a refund. But the power to refund was not the same as the power to moot a case and evade federal jurisdiction.

[40] *Susman v. Lincoln American Corp.*, 587 F.2d 866, 870 (7th Cir. 1978), *cert. den'd*, 445 U.S. 942 (1980); *see also White v. Mathews*, 559 F.2d 852, 857 (2nd Cir.), *cert. den'd*, 435 U.S. 908 (1978) *see, e.g.*, generally, *Wilson v. Secretary of Health & Human Services*, 671 F.2d 673, 679 (1st Cir. 1982); *Zeidman v. J. Ray McDermott & Co. Inc.*, 651 F.2d at 1030.

[41] *Jansen v. City of Cincinnati*, 977 F.2d 238, 241 (6th Cir. 1992) (quoting *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992).

[42] *See, e.g., Griffith v. Bowen*, 678 F. Supp. 942 (D. Ma. 1988) (this rule overrode mootness even where defendant's payments accepted and class certification not yet filed).

changes so rapidly that the courts cannot keep up, so necessity compels a similar result where defendants tender full amount of recovery to individual plaintiffs while the motion for certification is still pending."[43] Accordingly, *Zeidman v. J. Ray McDermott & Co.*,[44] explicitly held that a suit brought as a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims when a diligently pursued motion for class certification was pending before the district court.[45] The district court in *Zeidman* originally *refused* to certify a Rule 23 class because of lack of evidence as to numerosity, while the district court here stayed Petitioner's class certification motion and discovery *altogether* and never looked at the potential class. Following the concerns in *Roper*, district courts that do not take an opportunity to review the merits of the motion for class certification before dismissal in those cases in which it is financially feasible to pay off successive named plaintiffs afford corporate defendants the option to preclude a viable class action from *ever* reaching the certification stage.[46]

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[43] *Susman*, 587 F.2d at 870; *see also Zeidman*, 651 F.2d at 1050 (noting that tender to successive named plaintiffs by a wealthy defendant could, as a practical matter, make a decision on class certification just as difficult to produce as it was in *Gerstein*).

[44] *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d at 1045-51.

[45] *Id.* at 1051. *Accord Susman v. Lincoln American Corp.*, 587 F.2d at 866.

[46] *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991); *Roper*, 445 U.S. at 340; *Geraghty*, 445 U.S. at 404.

Here, the district court should, at a minimum, address the certification question after the partial mooting of Petitioner's claim to determine: (1) whether there remained a live "case or controversy" between MCI and at least some members of the class Petitioner sought to represent, and (2) whether Petitioner remained a proper class representative.[47] This Court made this clear in *United States Parole Commission v. Geraghty*.[48] Geraghty, a federal prisoner at the time, brought a proposed class action challenging parole guidelines. Here, Mr. Labora, an MCI customer, brought a proposed class action challenging MCI's improper billing practices under its tariffs. That district court denied certification and granted summary judgment for those defendants. The district court here stayed certification and discovery, altogether, and granted MCI's motion to dismiss. While the appeal was pending, Geraghty was mandatorily released and the defendants sought to dismiss the appeal as moot. While Petitioner's complaint was pending, MCI unilaterally refunded some of the disputed charges on one of Petitioner's bills and moved to dismiss as moot.

The Third Circuit in *Geraghty* ruled that the case was not moot, since class certification had been denied erroneously.[49] This Court affirmed, stressing that the dispute still existed in a form capable of judicial resolution, that

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[47] *See, e.g., Foster v. Center Township*, 798 F.2d 237, 245 (7th Cir. 1986).

[48] *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

[49] *See Geraghty v. United States Parole Commission*, 579 F.2d 238 (3d Cir. 1978).

is, in a truly adversarial relationship.[50] The Court analogized Geraghty's situation to cases "capable of repetition, yet evading review,"[51] even though Geraghty faced no "likelihood" of becoming involved in the same controversy in the future.[52] Petitioner, on the other hand, was demonstrably subject to the same controversy – in his April and then his June MCI telephone bills.

The decisions below failed to recognize that this Court looked beyond the mootness of Geraghty's substantive claims and focused instead on his wholly separate "procedural . . . right to represent a class."[53] As the Court explained,[54] "[a] plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class." Even after the plaintiff has no personal, substantive stake in the resolution of the merits of an action, he – or she – retains a procedural stake in the outcome of the certification motion sufficient to survive a motion to dismiss on grounds of mootness.[55] When continuation of an action is threatened because the representative plaintiff's claim is moot, certification of

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[50] *Id.* at 403; *see Zeidman*, 651 F.2d at 1047-48; *cf. Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982), *cert. den'd*, 460 U.S. 1069 (1983).

[51] *See, e.g., Weinstein v. Bradford*, 423 U.S. at 149; *Roe v. Wade*, 410 U.S. at 123-24.

[52] *Geraghty*, 445 U.S. at 398 & n.6.

[53] *Id.* at 402.

[54] *Geraghty*, 445 U.S. at 402.

[55] *Geraghty*, 445 U.S. at 404.

the class is vital.[56] If a named plaintiff, as the Court held in *Geraghty*, has a sufficient stake in the outcome of a class certification motion to appeal its denial, then Petitioner certainly has the necessary legal interest to press his claim for certification in the district court.[57]

Finally, Petitioner had been improperly billed, yet again, during the pendency of MCI's motion to dismiss for duplicate or non-talk calls. These decisions below, affirming denial of leave to amend to further allege a continuing "case or controversy," conflicts with Rule 15(a). This Court made clear that Rule 15(a) allows a party at least one chance to correct defects in their complaint when justice requires it:

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory

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[56] *See Johnson v. City of Opelousas*, 658 F.2d 1065, 1070 (5th Cir. 1981) (risk of mootness of representative's claims sufficient to create need for certification); *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 1000 (C.D. Cal. 1984) (without certification, possible that merits will not be heard); *Westcott v. Califano*, 460 F. Supp. 737, 746 (D. Mass. 1978) (certification protects members from risk of mootness of representative plaintiff's claim in Rule 23(b)(2) class).

[57] *See Sussman v. Lincoln American Corp.*, 587 F.2d at 880 (" . . . when a motion for class certification has been pursued with reasonable diligence and is pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of money damages."); *Quintana v. Harris*, 491 F. Supp. 1044, 1045 (D. N.M. 1980) (where plaintiff's individual claim becomes moot before motion for class certification is acted upon, case is not moot); *see also Geraghty*, 445 U.S. at 387 (" . . . timing is not crucial").

> motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should be 'freely given.'[58]

Failure to grant leave to amend for a jurisdictional defect is an abuse of discretion. If a complaint's allegations are insufficient to prove subject matter jurisdiction – here, capable of repetition, yet evading review – the proper course is to dismiss the original complaint with leave to amend to cure a failure to allege jurisdiction properly.[59]

Petitioner never got that chance, though he had new evidence that showed this improper billing practice was capable of repetition, yet evading review. It was an abuse of discretion to deny Petitioner that one chance to defeat mootness and swiftly establish the district court's jurisdiction.[60]

This error was underscored by the district court's denial of Petitioner's motion for rehearing and relief from judgment based on new evidence – that Petitioner had been double- and triple-billed improperly, yet again, in June, 1998. R1-21-1-4. MCI, as it had on the motion to

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[58] *Foman v. Davis*, 371 U.S. 178 (1962).

[59] *Majd-Pour v. Georgiana Community Hospital, Inc.*, 724 F.2d 901, 903 n.1 (11th Cir. 1984) (citing *Miller v. Stanmore*, 636 F.2d 986, 990 (5th Cir. 1981)).

[60] *Isbrandtsen Marine Services v. M/V Inagua Tania*, 93 F.3d 728, 734 (11th Cir. 1996) (amendment to correct mootness due to sale of vessel should have been allowed); *Rosen v. TRW, Inc.*, 979 F.2d 191 (11th Cir. 1992); *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991).

dismiss, also opposed that motion on the basis that MCI had engaged in no improper billing practice, that this evidence was not discovered with due diligence and would not have changed the outcome. R1-22-1-14. There was nothing dilatory about the time of presenting this new evidence. Petitioner's counsel had been on a prepaid 25th wedding anniversary vacation from June 25 (before that MCI bill would have been received in the mail) through July 17, 1998. R1-25-1. And the new evidence was filed with the District Court just five days after counsel's return. R1-21-3. That was hardly dilatory under Rule 59(a), Rule 59(e) or Rule 60(b)(2).

CONCLUSION

FOR THESE REASONS, Petitioner, ALEXANDER LABORA, prays that this Court grant a Writ of Certiorari to review the decision of the Eleventh Circuit Court of Appeal.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-5678

D. C. Docket No. 98-1073-CIV-SH

ALEXANDER J. LABORA, on behalf of himself and others similarly situated,

Plaintiff-Appellant,

versus

MCI TELECOMMUNICATIONS CORPORATION, a non-Florida corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(December 7, 1999)

Before EDMONDSON and BARKETT, Circuit Judges, and COHILL*, Senior District Judge.

PER CURIAM:

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* Honorable Maurice B. Cohill, Jr., Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

AFFIRMED. See Eleventh Circuit Rule 36-1.

"Costs taxed against the plaintiff-appellant."

Entered: December 7, 1999
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JAN 20 2000

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 98-1073-CIV-HIGHSMITH

ALEXANDER J. LABORA,

Plaintiff,

vs.

MCI TELECOMMUNICATIONS CORPORATION,

Defendant.

_____/

ORDER GRANTING MOTION FOR EXTENSION OF TIME

(Filed Jul. 16, 1998)

THIS CAUSE comes before the Court upon Plaintiff's Motion for Extension of Time, filed July 14, 1998. Upon due consideration, it is hereby

ORDERED AND ADJUDGED that said motion is GRANTED. The plaintiff shall have until and including July 27, 1998, to file his response to Defendant's Motion to Stay. It is further

ORDERED AND ADJUDGED that all further submissions to this Court SHALL comply with the local rules, including Rule 7.1.A.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of July, 1998.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Robert Maland, Esq.
Elliot Messer, Esq.
Thomas Meeks, Esq.
Cynthia B. Schultz, Esq.
Charles P. Scheeler, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 98-1073-CIV-HIGHSMITH

ALEXANDER J. LABORA,

Plaintiff,

vs.

MCI TELECOMMUNICATIONS CORPORATION,

Defendant.

_____/

ORDER GRANTING MOTION TO DISMISS

(Filed Jul. 20, 1998)

THIS CAUSE comes before the Court upon Defendant's Motion to Dismiss, filed June 18, 1998. For the reasons set forth below, the motion to dismiss will be granted.

PROCEDURAL BACKGROUND

On May 13, 1998, Plaintiff Alexander J. Labora ("Labora") filed a two-count class action complaint against Defendant MCI Telecommunications Corporation ("MCI"), alleging improper and duplicative billing practices. Upon receipt of the complaint, MCI apparently refunded to Labora the total alleged duplicate charges – $1.52. Currently, MCI moves to dismiss the complaint as moot.

STANDARD OF REVIEW

"Under Article III of the Constitution, it is a jurisdictional prerequisite that plaintiffs present an actual 'case or controversy.' " *American-Arab Antidiscrimination Comm. v. Thornburgh*, 970 F.2d 501, 506 (9th Cir. 1991). A "district court may review any evidence submitted on the issue to determine if subject matter jurisdiction in fact exists." *Western Trans. Co. v. Couzens Warehouse & Distributors, Inc.*, 695 F.2d 1033, 1038 (7th Cir. 1982). "[T]he party alleging jurisdiction must support its allegation with competent proof of jurisdictional facts." *Id.*

Moreover, this Court is not bound to accept as true the allegations of the complaint which tend to establish jurisdiction where a party properly raises a factual question concerning its jurisdiction to proceed with the action. *See Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977). Instead, the Court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists. *Id.; Western Trans.*, 695 F.2d at 1038. Accordingly, this Court may review the affidavits submitted with MCI's motion, and accompanying documentation, which establish that Labora's claims are moot.

FACTUAL BACKGROUND

Labora has been an MCI customer, receiving residential service since February 11, 1995. *Affidavit of Carol Morales*, ¶ 2. Since that time he has apparently contacted MCI's customer service on occasions where he believed

he ought to be issued credits and has, in fact, received such credits from MCI. *Id.*

On or about April 22, 1998, Labora received his telephone bill from MCI for the period March 22, 1998, through April 21, 1998 ("the April bill"). *Complaint*, ¶ 15. As noted above, on that bill, Labora was charged for three calls to Hollywood, Florida, all originating on March 31, 1998, at 9:32 a.m. *Complaint*, Exh. "A". The April bill also reflected two calls to Mexico City, Mexico, both originating on April 3, 1998, at 4:07. *Id.*

Labora did not contact MCI's customer service center to inquire about these calls. *Morales Aff.*, ¶ 4. Instead, Labora filed the instant class action complaint, alleging that the charges were improper and in violation of the Communications Act of 1934 and Section 364.08(1) of the Florida Statutes. *Complaint*, ¶ 34. MCI contends that the total alleged duplicative charges of which Labora complains is, at most, $1.52.[1] Although it contends that the charges were properly billed, rather than incur substantial legal expenses, MCI elected to credit Labora's account the full amount of the disputed charges. *Daniels Aff.*, ¶ 3.

DISCUSSION

The doctrine of mootness has its source in the case or controversy limitations in Article III of the Constitution. *Dallas Gay Alliance, Inc. v. Dallas County Hosp. Dist.*, 719 F. Supp. 1380, 1384 (N.D. Tex. 1989). Article III requires that

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[1] The $1.52 is as follows: 93¢ for the alleged 3/31/98 duplicate call, 49¢ for the alleged 4/3/98 duplicate call, plus 10¢ tax. *Affidavit of Majorie A. Daniels*, ¶ 2.

"a plaintiff must make out a case or controversy between himself and the defendant; that is, the plaintiff must allege a distinct and palpable injury to himself such as to warrant his invocation of federal-court jurisdiction." *Nat'l Wildlife Fed. v. Dept. of Interior,* 616 F. Supp. 889, 889 (D.D.C. 1984) (internal citations omitted); *see also Miler v. FCC,* 66 F.3d 1140, 1145-46 (11th Cir. 1995), *cert. denied sub nom Nat'l Ass'n of Broadcasters v. Miller,* 517 U.S. 1155 (1996). Thus, "[m]oot cases lie beyond the judicial power because the case or controversy ceases to exist once the matter has been resolved." *Id.; see also Deposit Guaranty Nat'l Bank v. Roper,* 445 U.S. 326, 335 (1980) ("the definitive mootness of a case or controversy . . . ousts the jurisdiction of the federal courts and requires dismissal of the case"); *Holstein v. City of Chicago,* 29 F.3d 1145, 1147 (7th Cir. 1994) ("[o]rdinarily, simply determining a plaintiff's case is moot dictates that his claim must be dismissed for lack of subject matter jurisdiction"); *Lusardi v. Xerox Corp.,* 975 F.2d 964, 974 (3rd Cir. 1992) ("no justiciable controversy is presented . . . when the question sought to be adjudicated has been mooted by subsequent developments").

"A case becomes moot when the dispute between the parties no longer rages, or when one of the parties loses his personal interest in the outcome of the suit." *Holstein,* 29 F.3d at 1147. Thus, a case will be subject to dismissal on grounds of mootness when a defendant satisfies the plaintiff's demand for relief. *Id.* (holding that plaintiff's claim was moot because the city offered "all damages due to him"); *Lusardi,* 975 F.2d at 974 ("[s]ettlement of a plaintiff's claims moots an action"); *Rand v. Monsanto Co.,* 926 F.2d 596, 597 (7th Cir. 1991) ("[o]nce the defendant

offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under Fed.R.Civ.P. 12(b)(1), because he has no remaining stake").

Article III limitations imposed by the mootness doctrine necessarily apply to class actions. *Dallas Gay Alliance*, 719 F. Supp. at 1384. "A putative class representative who alleges no individual injury may not seek relief on behalf of himself or any other member of the class." *Id.* As explained in *Lusardi*, "when claims of the named plaintiffs become moot before class certification, dismissal of the action is required." *Lusardi*, 975 F.2d at 974. The Eleventh Circuit has stated:

> In a class action, the claim of the named plaintiff, who seeks to represent the class, must be live both at the time he brings the suit and when the district court determines whether to certify the putative class. If the plaintiff's claim is not live, the court lacks a justiciable controversy and must dismiss the claim as moot.

Tucker v. Phyfer, 819 F.2d 1030, 1033 (11th Cir. 1987).

Stated another way, a plaintiff cannot represent a class of which he is not a member. *Bailey v. Patterson*, 369 U.S. 31, 31-32 (1962). If the claim of the class action plaintiff is moot, the action must be dismissed under *Fed.R.Civ.P.* 12(b)(1).

In the instant case, there is no actual, ongoing controversy. It is undisputed that MCI issued a credit to Labora in the amount of $1.52, which represents Labora's total potential damages in this case. *Daniels Aff.*, ¶ 3. This credit mooted Labora's own cause of action and renders

him ineligible to represent the putative class. Because the only named plaintiff in this suit has no case or controversy, this case must be dismissed for lack of subject matter jurisdiction.

Moreover, Labora's request for costs and interest does not create a case or controversy. As explained in *Bank of Marin v. England*, 385 U.S. 99, 111 n.1 (1966) (Fortas, J., dissenting), "[a]n unbroken line of cases establishes the rule that controversy as to costs alone does not salvage an otherwise moot case." Similarly, Labora's claim for attorney's fees also fails to save this case from dismissal. The Supreme Court has held that an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990).

Accordingly, because MCI has credited Labora's account in the full amount of the charges at issue, Labora's claim is moot and the Complaint must be dismissed with prejudice. *See Simmer v. Rios*, 661 F.2d 655, 660 (7th Cir. 1981); *Holstein*, 803 F. Supp. at 210.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss, filed June 18, 1998, GRANTED. This case is DISMISSED. All pending motions are DENIED as moot, and this case is CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of July, 1998.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Robert Maland, Esq.
Thomas Meeks, Esq.
Cynthia B. Schultz, Esq.
Charles P. Scheeler, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case no. 98-1073-CIV-HIGHSMITH

ALEXANDER J. LABORA,

Plaintiff,

v.

MCI TELECOMMUNICATIONS CORPORATION,

Defendant.

_____/

ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING, DENYING PLAINTIFF'S RULE 60(b)(2) MOTION FOR RELIEF FROM ORDER OF DISMISSAL AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

(Filed Oct. 19, 1998)

THIS CAUSE is before this Court on Plaintiff's Motion for Rehearing, Plaintiff's Rule 60(b)(2) Motion for Relief from Order of Dismissal, and Plaintiff's Motion for Leave to File Amended Complaint.

Under Rule 60(b)(2), a party may obtain relief from a final judgment on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed.R.Civ.P. 60(b)(2). The Eleventh Circuit has adopted the five-part test used in many jurisdictions to determine

whether "newly discovered" evidence warrants vacating a judgment:

> (1) the evidence must be newly discovered since the judgment; (2) due diligence on the part of the movant to discover the new evidence must be shown; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be such that a new trial would probably produce a new result.

Scutieri v. Paige, 808 F.2d 785, 793 (11th Cir. 1987).

A motion to vacate a judgment under Rule 60(b)(2) is an extraordinary motion and the requirements of the rule must be strictly met. Id.; *Ag Pro. Inc. v. Skraida*, 512 F.2d 141, 143 (5th Cir. 1975). The movant bears the burden of demonstrating that the requirements have been satisfied. *Stilwell v. Travelers Insurance Company*, 327 F.2d 931 (5th Cir. 1964). If any one of the five elements is not satisfied, the motion fails. *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1527 (1st Cir. 1991). For the purpose of evaluating a Rule 60(b) motion, the court takes as true the movant's factual assertions. *Kerwit Med. Products v. N & H Instruments*, 616 F.2d 833, 836 (5th Cir. 1980); *United States v. Cirami*, 563 F.2d 26, 28 (2d Cir. 1977).

A. Plaintiff Has Failed to Establish That The Evidence is "Newly Discovered" Within The Meaning of Rule 60(b)(2).

Any evidence that was in the plaintiff's possession prior to the judgment cannot be considered "newly discovered" within the meaning of Rule 60(b)(2). *Johnson*

Waste Materials v. Marshall, 611 F.2d 593, 597 (5th Cir. 1980). Some courts impose the additional requirement that the evidence must have come into existence prior to the judgment or while the matter was under advisement. *See NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 364 (5th Cir. 1978); *Davis by Davis v. Jellico Community Hosp. Inc.*, 912 F.2d 129, 136 (6th Cir. 1990).

Plaintiff's alleged newly discovered evidence is a phone bill dated June 22, 1998.[1] Defendant indicates in a sworn affidavit that all phone bills are mailed first class on the statement date. *See* Defendant's Opposition to Plaintiff's Motion for Rehearing and Rule 60(b)(2) Motion for Relief from Order of Dismissal, Exhibit 2. Even if the mailing time is taken into account, it is readily apparent that Plaintiff had possession of the evidence for almost one moth prior to the Court's entry of judgment on July 20, 1998. Accordingly, the June 22, 1998 telephone bill cannot constitute newly discovered evidence.[2]

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[1] Plaintiff also argues that he has alleged additional tariff violations in an amended complaint which constitute newly discovered evidence. This argument hardly warrants discussion. Plaintiff does not cite any case law holding that new allegations contained in an amended complaint constitute newly discovered evidence warranting relief under Rule 60(b)(2). Allegations are not evidence and cannot serve as the basis for setting aside a judgment.

[2] Plaintiff's counsel indicates that the "newly discovered-evidence" was not brought to the Court's attention prior to the entry of judgment because he was on vacation during the period of June 25, 1998 through July 17, 1998. The fact that Plaintiff's counsel was on vacation is irrelevant to the inquiry. As discussed *supra*, the requirements of Rule 60(b)(2) must be strictly met. *E.g. Stilwell v. Travelers Insurance Co.*, 327 F.2d at

B. Plaintiff Has Not Demonstrated That The Newly Discovered Evidence Would Likely Produce a New Outcome.

A district court may weigh the credibility of new evidence in ruling on a Rule 60(b)(2) motion. E.g. *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 983 F.2d 800 (7th Cir. 1993). A contrary rule would result in the setting aside of a judgment every time a party presented new evidence, no matter how incredible that evidence was. *Id.*

Plaintiff's newly discovered evidence consists of a June 22, 1998 phone bill which allegedly contains charges for calls which did not connect. Defendant has submitted affidavits indicating that the alleged questionable charges on the June 22, 1998 statement were for phone calls that connected and lasted one minute. *See* Defendant's Opposition to Plaintiff's Motion for Rehearing and Rule 60(b)(2) Motion for Relief from Order of Dismissal, Exhibit 1. Therefore, this Court concludes that the Plaintiff's "newly discovered" evidence would not, in all likelihood, produce a new outcome.

For the foregoing reasons, it is

ORDERED and ADJUDGED that Plaintiff's Motion for Rehearing and Plaintiff's Rule 60(b)(2) Motion for Relief from Order of Dismissal are DENIED.

It is further ORDERED that Plaintiff's Motion for Leave to File Amended Complaint is DENIED.

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931. Plaintiff possessed the evidence prior to the entry of final judgment, therefore, it is not newly discovered evidence.

DONE AND ORDERED in Chambers at Miami, Florida this 19th day of October, 1998.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES
DISTRICT JUDGE

cc: Robert Maland
Alexander Labora
Thomas Meeks

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-1073-CIV-Highsmith
U.S. Magistrate Judge Bandstra

ALEXANDER J. LABORA,

Plaintiff,

vs.

MCI TELECOMMUNICATIONS CORPORATION,

Defendant.

_____/

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR STAY AND MEMORANDUM IN SUPPORT THEREOF

Plaintiff has filed a two (2) Count Complaint as a proposed class action seeking redress for the Defendant's improper practice of duplicate and triplicate billing for telephone calls.

The Defendant has filed a Motion to Dismiss. It is the Plaintiff's position that the Complaint properly states claims for relief and a pleading deficiency, if any, found in the complaint may be corrected by amendment.

Additionally, among other things, within his response to Defendant MCI's Motion to Dismiss, Plaintiff relies upon the "similar occurrences" exception to the mootness doctrine. (Plaintiff's Response Memo p. 12) and notes that authority exists from the Defendant to be required to identify potential class members at this time,

under the circumstances now presented in this case. (Plaintiff's Response Memo p. 14, footnote 4).

The Plaintiff has served an initial set of Interrogatories, a Request for Production and a Request for Admission on the Defendant[1] focused primarily on the issues which arise under Rule 23(a) in the class certification process, as well as the issues raised within the motion to dismiss. In response, the Defendant has filed the instant Motion to Stay.[2]

Since Plaintiff's initial discovery properly focuses on class certification issues and issues raised with the Defendant's Motion to Dismiss, there is no reason to impose discovery limitations at this point. It is appropriate for the Plaintiff to conduct limited discovery to gather evidence in support of his motion for class certification and in opposition to the motion to dismiss. The Plaintiff has not gone beyond proper and reasonable discovery at this point in the proceedings. Moreover, there is no reason to delay discovery pending a decision on the Motion to Dismiss. To the contrary, Plaintiff will be prejudiced in his ability to defend against the Motion to Dismiss and in otherwise proceeding herein if the present limited and reasonable discovery is not allowed.

In addressing the issue before this Honorable Court, both the Fifth and Eleventh Circuits have determined that the Plaintiff is entitled to leeway in conducting discovery

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[1] These are attached as Exhibits 1, 2, and 3 to Defendant's Motion for Stay and are not attached hereto for sake of brevity.

[2] Plaintiff intends to file a motion to compel, if the initial discovery is not timely responded to by Defendant.

which is necessary to define the parameters and scope of the proposed class.

In *Pitman v. E.I. duPont de Nemours & Co., Inc.*, 552 F.2d 149, 150 (5th Cir. 1977) the Court stated, in pertinent part:

> Of course, a certain amount of discovery is essential in order to determine the class action issues and the proper scope of a class action. The Plaintiff is entitled to some leeway in attempting to define the proper parameters of his proposed class.

Consistent with the foregoing general principles, the Eleventh Circuit stated in *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570-71 (1992) that:

> in the class action context, one of first issues confronting the court is class certification. *See* Fed. R.Civ.P. 23(c)(1) ("As soon as practicable after the commencement of the action brought as a class action, the court shall determine by order whether it is to be so maintained"). To make early class determination practicable and to best serve the ends of fairness and efficacy, courts may allow classwide discovery on the certification issue and postpone discovery on the merits.

Since the Plaintiff herein has not exceeded the reasonable bounds of discovery, at this point, it is premature and unnecessary to consider discovery limitations. Nevertheless, even if this Court were to consider some form of discovery limitations, Plaintiff should not be prevented from conducting discovery reasonably related to any of the class certification issues and motion to dismiss issues.

In the present case, the Plaintiff has propounded a set of interrogatories, a request for production and a request for admission to the Defendant focused upon the prerequisites to a class action under Rule 23(a) Fed.R.Civ.P., which are:

> "(1) is the class is so numerous that joinder of all members is impracticable (i.e. numerosity);
> (2) are these questions of law or fact common to the class (i.e. commonality);
> (3) are the claims or defenses of the representative parties typical of the claims or defenses of the class (i.e. typicality), and
> (4) will the representative parties will fairly and adequately protect the interests of the class.

Upon review, it can readily be seen that Plaintiff's preliminary discovery propounded herein reasonably relates to the class certification and motion to dismiss issues and therefore, it would be both premature and unnecessary to impose any discovery limitations at this time.

CONCLUSION

Rule 23(c)(1) dictates that as soon as practical, the Court should determine if this matter will proceed as a class action. Responses from the Defendant to the Plaintiff's pending discovery reasonably relate to the issues pertinent to class certification.

A Plaintiff should be allowed a reasonable amount of leeway in obtaining discovery necessary or helpful to evaluating the various class certification issues found within Rule 23(a).

Our Plaintiff's initial discovery is proper and is primarily focused on obtaining information necessary in defining the proper parameters and scope of the proposed class and in opposing the issues raised in the Motion to Dismiss.

Accordingly, the Defendant's Motion to Stay should be denied with regard to the presently propounded discovery.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. mail on this 22 day of July, 1998 on: Thomas Meeks, Esquire, Zuckerman, Spaeder, Taylor & Evans, LLP, Miami Center, Ste. 900, 201 So. Biscayne Boulevard, Miami, FL 33131-4326.

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